No. 12884.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL FRUIT & VEGETABLE COMPANY and WEST TEXAS PRODUCE COMPANY,

Appellants,

vs.

ASSOCIATED FRUIT DISTRIBUTORS OF CALIFORNIA, RAYMOND M. CRANE, RED LION PACKING COMPANY, and JOHN C. KAZANJIAN,

Appellees.

PETITION FOR REHEARING.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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PETITION FOR REHEARING.

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

A rehearing is requested upon the following grounds:

1. Appellants' right to relief against Crane was not waived by a failure to appeal from the order of the Secretary of Agriculture dismissing as to Crane, the appeal by Kazanjian from such order having reinstituted the entire proceeding as an original proceeding in the District Court as an original proceeding—involving all parties and all issues.

2. The telegrams of October 3, 1944, and October 4, 1944, which are quoted in the opinion of the court are of clear, plain and unambiguous language, the meaning of which should not have been varied by the interpretation given to same by the court.

3. The opinion of the court reflects a failure to give effect to the controlling difference between this case and that of *Joseph Denunzio Fruit Co. v. Crane,* 79 Fed. Supp. 117.

Appellants Cannot Be Held to Have Acquiesced in the Order Dismissing as to Crane.

The facts of this case are such that, if the decision of the court dismissing appellants' complaint against Kazanjian is sound, it is inescapable that Crane is liable to appellants. This court, however, has denied such relief by a *sua sponte* determination that appellants had waived their rights against Crane by failing to appeal from the order of the Secretary of Agriculture which dismissed as to Crane. It is unfortunate perhaps that Crane did not urge such waiver as a defense, for in such event, the law thereon would have been briefed and submitted to the court, clearly establishing that no such waiver had taken place.

While there appear to be no cases under the Perishable Agricultural Commodies Act involving the precise question, Paragraph (c) of Section 7 of such act (7 U. S. C. A., Sec. 499g(c)) has been construed as providing for a trial *de novo,* to wit:

> "* * * a trial anew of the entire controversy, including the hearing of evidence as though no previous action had been taken."
>
> *Spano v. Western Fruit Growers, Inc.* (C. C. A. 10), 83 F. 2d 150, 152.

Particularly explanatory of the law governing an appeal by trial *de novo* from an administrative order is the early United States Supreme Court decision of *Grisar v. McDowell,* 6 Wall. 363, 73 U. S. 863, wherein the Su-

preme Court cautioned that in this type of an appeal one should not be misled by the term "appeal," for, in effect, it is more of a transfer of jurisdiction than an appeal. That case involved conflicting claims of the United States Government and the City of San Francisco to certain land allotments. Both parties appealed from a decision of a federal board of land commissioners, thus giving rise to a trial *de novo* in the District Court. Prior to trial in the District Court, the United States had dismissed its appeal. The Supreme Court held that, despite such dismissal, the United States was not precluded from urging every right and contention that was available to it before the administrative board.

Analogy is to be found, also, in *de novo* proceedings which follow an appeal from admiralty decisions of the District Court. Our Supreme Court, in the case of *Standard Oil Co. of New Jersey v. Southern Pacific Company,* 45 S. Ct. 465, 467, 268 U. S. 146, 69 L. Ed. 890, said:

> "On appeal in admiralty, there is a trial *de novo.* The whole case was opened in the Circuit Court of Appeals by the appeal of the Southern Pacific Company, *as much as it would have been if the Director General had also appealed."* (Emphasis supplied.)

In *Reid v. Fargo,* 241 U. S. 544, 36 S. Ct. 712, the Supreme Court held that on the *de novo* appeal in admiralty, recovery may be had against a party who was dismissed by virtue of a decree which was not appealed from.

Where an admiralty decree denied the libel as to one claim, but sustained it as to another, an appeal required hearing *de novo* the decree of the court as to both claims.

The John Twohy, 255 U. S. 77, 41 S. Ct. 251.

The Court's Commentary and Interpretation of the October 3 and 4 Telegrams Cannot Be Justified.

Neither the Secretary of Agriculture, the District Court, the parties to this proceeding, nor even this court, has determined or contended that the telegrams of October 3, 1944, and October 4, 1944, quoted in the court's opinion, are ambiguous or uncertain. Without intending disrespect for this court, in our opinion, any ambiguity that now remains is to be found not in the language of the parties, but in the court's commentary thereon. For Crane to have said to Kazanjian "HAVE SOLD FOR YOUR ACCOUNT," is plain, and unambiguous. For the court to interpret such language as meaning that "subject to confirmation, Crane, for Kazanjian's account, had made contracts with buyers (not named or identified), whereby the buyers had contracted to buy from Kazanjian and Crane, for Kazanjian's account, had contracted to sell to the buyers," is either a more elaborate way of saying that Crane had sold for Kazanjian's account, or it is a completely ambiguous restatement of an otherwise simple and succinct statement. When Kazanjian, on October 4, 1944, replied, "FIFTEEN CARS STORAGE US ONE EMPERORS DECEMBER 10TH CONVERSION SATISFACTORY," he was clearly and unambiguously stating that he was satisfied by the sale which Crane had reported to him in his October 3, 1944, telegram respecting 15 cars of grapes. For the court then to paraphrase this language and to hold that by it, it was intended by both Crane and Kazanjian to mean that Kazanjian "was still willing to make con-

tracts with buyers (not named or identified), whereby the buyers would contract to buy from Kazanjian, and Kazanjian would contract to sell to the buyers," is clearly a conversion of simple clarity into compound ambiguity.

That neither Crane nor Kazanjian understood these telegrams within the interpretation ascribed to them by this court is clear from the *very first communication* thereafter by Crane when, on October 10, 1944, he wired Margules, "SHIPPER REDLION TAKES VIEW ACCOUNT CEILING LIFTED ANY CONTRACTS EMPERORS VOIDED." [Tr. p. 481.] He didn't say that he or Kazanjian had failed to consummate the sale to appellants. He said that Kazanjian, his principal, felt that the lifting of the ceiling prices had the effect of *voidiing such contracts.* Again, on October 16, in the *last communication* of the parties to this proceeding, Crane wired to Margules "AGAIN TALKED REDLION. THEY STATE DEFINITELY UNWILLING ABIDE ANY SALES MADE WHERE CEILING DEFINITE CONSIDERATION." [Tr. p. 482.] Here again Crane belies the Court's interpretation by written proof of his principal's instructions, disclosing both Crane's and Kazanjian's intention that, despite the SALES ALREADY MADE, the ceiling price having been a definite consideration, the seller refused to abide by his contract.

We are morally certain that this court did not intend to abet Kazanjian's violation of the integrity of his contract, and yet, it should be clear to the court that its unrealistic interpretation modifying the plain intent of unambiguous language accomplishes no other result.

There can be no justification for this court's ruling that the district court finding that Kazanjian did not contract to sell any grapes to appellant, was not clearly erroneous. Rule 52(a) of the Federal Rules of Civil Procedure cited by the court, provides that *findings of fact* shall not be set aside unless clearly erroneous. That Kazanjian had not contracted to sell grapes to appellants, was in this instance a conclusion to be drawn from the specific fact findings and not in itself a finding of fact. As we have pointed out in our briefs in this case, the only findings of the District Court which are supported by competent and credible evidence permit but one conclusion, to wit: a sale of grapes to appellants by Kazanjian through Crane, as a broker. Rationality and common sense establish but one reason for the failure to deliver, the only reason which appellees themselves expressed prior to the heat of litigation, to wit: the removal of ceiling prices. In determining what is "clearly erroneous," the established test is that the reviewing court on the entire record be left with the definite and firm conviction that a mistake has been committed. (*United States v. U. S. Gypsum Co.,* 333 U. S. 364, 395, 68 S. Ct. 525.) Reviewing the record of this case, we cannot perceive how one can avoid the definite and firm conviction that the seller reneged on his contract by virtue of a change in price structure. A conclusion to the contrary requires abandonment of the plain interpretation of written communications and a resort to a selection from the tenuous, contradictory and unreasonable defenses of the defaulter.

The Court's Opinion Reveals a Failure to Distinguish the Denunzio Case From the Instant Case.

The *Denunzio* case was tried upon a different theory than the instant case. The court's lengthy footnote on the *Denunzio* case, and its notice that the Secretary, Judge O'Connor, Judge Carter and the Court of Appeals had agreed that Denunzio was not entitled to recover damages of Kazanjian, makes clear to us that unfortunately the court has failed to note the vital distinction between the two cases. It must be noted that the instant *case was tried by the Secretary of Agriculture after and not before the Secretary's decision in the Denunzio case.* The Secretary notes that there are distinguishing facts in the two cases. [Tr. p. 59.] Being the later decision, the Secretary's decision in this case was more advised and more informed than his decision in the *Denunzio* case. It appears from the opinion of the Secretary of Agriculture in the *Denunzio* case that there was not before him or that he had not noted the existence of the telegram of October 4, 1944, whereby Kazanjian had definitely ratified the sale. Having no evidence before him to bind Kazanjian as a principal, the Secretary was compelled in the *Denunzio* case to hold that the agent who apparently had acted without authorization of his principal, was the party liable. In our case, however, it was clear to the Secretary that Kazanjian ratified the sale in writing on October 4, 1944. In the District Court, Denunzio *elected* to hold the agent liable on the theory that where the principal is undisclosed, either principal or agent may be held

liable. To the extent that the *Denunzio* case justifies a decision against Crane as distinguished from Kazanjian, it is not effective authority in the instant case. We are confident that a re-examination and rehearing by the court will disentangle any confusion now existing as to the proper application of the law of the *Denunzio* decision to the issues of the instant case.

Conclusion.

That portion of the court's opinion which attributes waiver to a failure to appeal from an administrative order already appealed from was neither argued nor briefed before the court. It is a determination of grave consequence, since it involves a radical departure from the established practice governing such appeals. It creates an issue which should be most carefully re-examined and reconsidered by the court, with full opportunity afforded to counsel to brief and argue the same.

That portion of the court's opinion which reinterprets and varies the common acceptation of plain and unambiguous language, is likewise of grave consequence, requiring the court's studied re-examination and reconsideration. Few principles of law have been as definitely established as that which holds that it is for the parties to make a contract, and not for the courts to modify the clearly expressed intent of the parties.

That portion of the court's opinion which indicates that the *Denunzio* decision is a precedent to be followed in this case, and which misconceives the underlying distinction between the two cases, also demands thorough re-examination and reconsideration.

We are confident that the court's purpose to accomplish justice and avoid error, is no less fixed than our

adamant determination not to yield to error. We, therefore, urgently and respectfully petition for a rehearing of the issues of this case.

Respectfully submitted,

HARRY A. PINES,
ADELE WALSH, and
J. MANUEL HOPPENSTEIN,
By HARRY A. PINES,
Attorneys for Appellants.

Certification.

I, Harry A. Pines, an attorney regularly admitted to practice in the United States Court of Appeals for the Ninth Circuit, do certify that in my opinion, the foregoing petition for rehearing in the case of Central Fruit & Vegetable Co., *et al.,* appellants, vs. Associated Fruit Distributors of California, *et al.,* appellees, is well founded and that it is not presented for the purpose of creating delay.

HARRY A. PINES.